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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JAMAR JOHNSON, Defendant and Appellant.	B187559 (Los Angeles County Super. Ct. No. BA265526)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mark V. Mooney, Judge. Affirmed as modified and remanded with directions.

Chris R. Redburn, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Mary Sanchez and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Jamar Johnson, appeals from the judgment of conviction of second degree murder, attempted murder, shooting at an occupied motor vehicle, and assault with a semiautomatic firearm. He contends: (1) the trial court erred in admitting his confession; (2) his motion to sever should have been granted; (3) the trial court erred in precluding him from introducing evidence of third-party culpability; (4) he was prejudiced by the erroneous admission of evidence of the victims' character, and (5) the abstract of judgment does not accurately reflect the judgment.[1] We modify and affirm as so modified.

FACTUAL AND PROCEDURAL BACKGROUND

Viewed in accordance with the usual rules on appeal (*People v. Kraft* (2000) 23 Cal.4th 978, 1053), the evidence adduced at trial established defendant's involvement in three shooting incidents:

1. *October 27, 2003 (Count 5)*

The alley off Garth is in an area claimed by the Playboy Gangster Crips gang; the Down Insane Mexican Familia (DIMF) gang coexists with the Playboy Gangster Crips. On October 27, 2003, a neighbor was in the front yard of her home on Garth when she heard a scuffle in the alley. The neighbor saw a Hispanic man run into the alley holding a rake. Two or three minutes later, she saw defendant run out of the alley, pull a gun out of his pants, run back to the alley and fire the gun.

Rogelio Romo testified that he was in the alley off Garth with his brother Gusavo and his friend Edgar that day when eight or more Black men approached and asked where they were from. Romo and his companions replied, "Mexico." One of the Black men said, "Playboys," then hit Edgar. Romo ran to get a rake to protect his

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[1] Defendant was charged by information with the murder of Melvin Brooks, the attempted first degree murders of Garfield Wolfe and Brian Jenkins, shooting at an occupied motor vehicle and assault with a semi-automatic firearm; firearm use and gang enhancements were also alleged.

friends; as he was running back to the alley, the sound of gun shots caused him to run away. From photographs, Romo identified defendant either as the shooter, or as someone who looked similar to the shooter. Romo denied that he was a member of the DIMF gang, but a Los Angeles Police Department gang officer testified that Romo was an associate of the DIMF gang; the officer had seen Romo with other gang members in that alley.

Police found two shell casings at the scene which a Los Angeles Police Department firearms analyst determined came from defendant's gun. However, the casings were destroyed prior to trial, and defendant's ballistics expert did not have an opportunity to examine them.

2. *December 8, 2003 (Counts 3 and 4)*

The intersection of La Cienega and Cadillac is in an area claimed by the Playboy Gangster Crips gang. At about 5:00 p.m. on December 8, 2003, Brian Jenkins was driving his white Jeep Cherokee on La Cienega. While stopped at Cadillac, Jenkins heard gunshots. Looking in his rearview mirror, Jenkins saw a man standing in the middle of the street, shooting towards his car; Jenkins later found a bullet hole in his car, but threw away the bullet. No one was injured in the shooting and no one could identify appellant as the shooter. Two bullet casings from a .40-caliber gun were found nearby. Sachs determined that these casings came from defendant's gun.

3. *January 2, 2004 (Counts 1 and 2)*

Jefferson and La Brea is on the outer perimeter of the area claimed by the Geer Street gang, but was not a place where members of that gang are known to congregate. Garfield Wolfe testified that at about 1:30 a.m. on January 2, 2004, he was walking south on Jefferson Boulevard, between Orange and La Brea, when the sound of gun shots caused him to seek safety in a stairwell. Believing the danger had passed, Wolfe left the stairwell less than a minute later. But he ducked back in again when he saw a Black man walking towards him pointing a gun. Wolfe was shot eight times and was

seriously wounded. Wolfe saw his assailant's face for a moment, but could not recognize him again. He told investigating officers that the man might have been "light skinned" or a Mexican.

Ronald Yaw, a police officer for the Federal Protective Service Department, Homeland Security, was stopped at the intersection of Jefferson and La Brea at about 1:00 a.m. on January 2, 2004, when, about 80 yards away, he saw a slender Black man standing in the middle of the street fire a gun five or six times toward the alcove of a building, then turn and shoot a pedestrian twice in the back. The victim was Melvin Brooks, who died of his wounds. Yaw radioed the shooting in and then attempted to follow the shooter, but lost sight of him. He was unable to identify the suspect.

Six bullets and seven casings were found at the scene of the shootings. The firearms expert determined that seven of the casings came from defendant's gun. Of the six bullets, five "had similar characteristics to" defendant's gun, but the expert's report was not conclusive. Two bullet fragments recovered from Brooks's body did not come from defendant's gun but may have been expelled from the same gun as the sixth bullet.

4. *Defendant's Arrest*

On January 7, 2004, a woman informed the police that she saw defendant hiding behind a tree after putting something inside a barbeque near her apartment building. Responding officers detained defendant in the courtyard of the apartment building and found a .40-caliber semiautomatic handgun in the barbeque. Defendant told the police that he found the gun about a year before. Defendant asked the officers how to become a "hit man." He did so "to get on the police nerves."

On January 29, 2004, defendant was committed to the California Youth Authority after he admitted being in possession of a firearm on January 7, 2004.

5. *The Postarrest Interview*

Over defendant's objection, the trial court admitted into evidence a recording and transcript of defendant's April 19, 2004, interview with detectives Nolte and Walthers, which took place at the juvenile camp facility to which defendant had been committed. (People's Exhibits 1A and B). In addition to Nolte and Walthers, a camp supervisor was also present. In the interview, defendant admitted he was a member of Tiny Locs Gangster Crips. In December 2003, defendant's mother lived on Garth, but defendant was living with either a cousin or a friend of his mother's on Corning.

Defendant told the detectives that the gun police found on the day of his arrest (January 7, 2004) was one he purchased in October or November 2003 for $100. When asked about the shootings during October 2003 to January 2004, defendant at first denied any involvement but eventually admitted the following:

- Regarding the shooting in the alley behind Garth, defendant said he had been in an alley with some friends when some Hispanics began harassing them and using racial epitaphs. Defendant pulled the gun out of his waistband and showed it to the Hispanics, but then put the gun back in his waistband. A fist fight ensued and after someone hit defendant with a two-foot long metal pipe, he took out the gun and fired three rounds towards his assailants before running up the alley.
- Regarding the shooting on Cadillac, defendant said he was with some friends when the friends "got into it" with someone in a car. When "they" asked to see defendant's gun, defendant asked why, to which "they" responded "they got into it with somebody, whatever. So I just gave them the gun. And then they went around the corner and I was walking towards Cadillac. And then all I see is them in the street and then shooting." Defendant later learned that the incident began when the shooting victim drove by in a white Jeep and asked what they were looking at.

- Regarding the shooting on Jefferson and La Brea, defendant said he and two others were passengers in a friend's brown Camry on the way to a fast-food restaurant located in an area defendant knew was claimed by a rival gang. Defendant knew that if they encountered any rival gang members there would be a shooting. When a pedestrian who defendant recognized as a rival gang member flashed a gang sign, the car in which defendant was riding pulled over and defendant and his companions got out. The pedestrian asked "where you from," to which defendant responded "Tiny Loc." The pedestrian fired four shots toward defendant and then took cover behind a wall; defendant walked into the middle of the street and fired back seven shots. One of defendant's companions, who was armed with a .25 semiautomatic, fired twice. Defendant and his companions then ran back to the car.

The jury found defendant guilty of second degree murder of Brooks (count 1), the premeditated attempted murder of Wolfe (count 2), shooting at Jenkins's occupied vehicle (count 4), and assault with a semiautomatic firearm (count 5); the jury also found true some, but not all, of the gun use and gang enhancements.[2] He was sentenced to 75 years to life in prison.

DISCUSSION

1. *Defendant's Postarrest Statement Was Admissible*

Defendant contends the trial court erred in denying his motion to suppress evidence of his postarrest statement to police. He argues that the totality of the circumstances show that he did not voluntarily waive his right not to incriminate himself or his right to counsel. We disagree.

Under federal and California constitutional law, the voluntariness of a confession must be established by a preponderance of the evidence. This standard

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[2] The jury found defendant not guilty of the attempted premeditated murder of Jenkins and of the lesser included offense of attempted voluntary manslaughter (count 3).

applies to juvenile suspects as well as adults. The "fundamental analytical steps are the same in both cases. The trial court must first determine the evidentiary facts—what happened—and then, weighing all of the circumstances, determine the ultimate question, whether the individual's free will was overborne." (*In re Aven S.* (1991) 1 Cal.App.4th 69, 75-76 (*Aven S.*).) The suspect's age is just one circumstance to be considered; other factors include whether there have been threats, promises, confinement, or lack of food or sleep. Although a juvenile's request to speak with his parent will normally be construed as an invocation of his Fifth Amendment rights, the police are not obliged to advise a juvenile suspect of a right to speak with parents or have them present during questioning. (*Id*. at p. 75.)

Upon review of the trial court's finding that a confession was voluntary, we make "an independent examination of the record and determine the ultimate issue independently as well. With respect to conflicting testimony, however, we accept the version favorable to the People to the extent it is supported by the record." (*Aven S.*, *supra*, 1 Cal.App.4th at p. 76.)

Here, prior to questioning, Nolte advised defendant of his right to remain silent and to appointed counsel. There followed this exchange: "DETECTIVE NOLTE: Do you want to talk about it? Want to talk to us? [¶] JAMAR JOHNSON: I don't know what it's about. What's it about? [¶] DETECTIVE NOLTE: Several incidents prior to your arrest that we think you may have some information on. [¶] JAMAR JOHNSON: Like what? [¶] DETECTIVE NOLTE: Well, first, about the arrest. A couple things about when you were arrested, why you're in here to start with. You want to talk to us about those things? [¶] JAMAR JOHNSON: I guess so."

First, we find no merit in defendant's argument that he agreed only to talk about the reason for his juvenile commitment, not about the shootings.[3] Nolte unambiguously stated his desire to talk to defendant about "several incidents prior to" defendant's arrest and the arrest was only the first subject.

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3 This was the sole grounds of his motion to suppress in the trial court.

Second, that defendant was interviewed while confined in a juvenile facility did not render his confession involuntary inasmuch as there is no evidence he was denied food or sleep or that any threats were made. While "confinement" can be a factor (*Aven S*, *supra*, 1 Cal.App.4th at p. 75), obviously most mirandized statements occur in a jail setting.

Third, that police misled defendant into believing the evidence against him was stronger than it was does not render defendant's confession involuntary. The police are "at liberty to utilize deceptive stratagems to trick a guilty person into confessing. The cases from California and federal courts validating such tactics are legion." (*People v. Chutan* (1999) 72 Cal.App.4th 1276, 1280.)

Finally, the exchange between Walthers and defendant during the interview, followed by defendant's admission to his involvement in the shooting at Jefferson and La Brea, does not establish that defendant's admission was coerced: "DETECTIVE WALTHERS: . . . [W]e came up here because we're investigating a murder case. And when we leave here with these answers that you've given us and these explanations and these lies that you've given us, were [*sic*] going to now go file murder charges against you, do you understand that? [¶] JAMAR JOHNSON: Yes, sir. [¶] DETECTIVE WALTHERS: Do you understand what that means to you? [¶] JAMAR JOHNSON: That you're going to file murder charges and (inaudible). [¶] DETECTIVE WALTHERS: Do you think you should take this opportunity to tell us the truth? [¶] JAMAR JOHNSON: Yes, sir. [¶] DETECTIVE WALTHERS: Why don't you tell us the truth." "When the benefit pointed out by the police to a suspect is merely that which flows naturally from a truthful and honest course of conduct, we can perceive nothing improper in such police activity." (*People v. Hill* (1967) 66 Cal.2d 536, 549.) Here, Walthers did no more than encourage defendant to be truthful, he did not expressly or impliedly offer defendant any benefit in exchange for the truth.

2. *There Was No Error in Denying the Motion to Sever*

Defendant contends he was denied due process as a result of the trial court's denial of his motion to sever counts 1 and 2 (the Brooks murder and Wolfe attempted murder charges, respectively) from counts 3, 4 and 5 (the attempted murder of Jenkins, shooting at an occupied motor vehicle, and assault upon Romo with a semiautomatic firearm, respectively). He argues that the evidence of his guilt on each case was weak, but he was prejudiced by the " 'spillover effect' " of the cumulative evidence. We disagree.

" 'Refusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; [or] (3) a "weak" case has been joined with a "strong" case, or with another "weak" case, so that the "spillover" effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges." (*People v. Grant* (2003) 113 Cal.App.4th 579, 586-587.)

Here, none of the factors indicating abuse of discretion was present. The charges were not likely to inflame the jury. The evidence tying defendant to the gun, the ballistics evidence linking the gun to each crime, and the gang evidence were cross-admissible. Finally, the evidence was equally strong as to each of the cases. As to each count, defendant admitted that his gun was used in the shootings and ballistics evidence confirmed this; defendant admitted to being the shooter in three of the five counts and a witness identified defendant as the shooter in one count. The aider and abettor evidence as to other counts was supported by defendant's admission that he gave his gun to an associate knowing that the gun was likely to be used to shoot the person with whom there had just been an altercation.

3. *Evidence of Third-Party Culpability*

Defendant contends the trial court erred in excluding evidence that a third party may have been culpable in the Brooks/Wolfe shooting. He argues that he should not have been precluded from adducing evidence that the police investigated whether another gang member, who owned a white Dodge Intrepid, was involved in the shooting. We disagree.

Evidence that a person other than the defendant committed the charged offense is relevant. But to be admissible, "evidence of the culpability of a third party offered by a defendant to demonstrate that a reasonable doubt exists concerning his or her guilt, must link the third person either directly or circumstantially to the actual perpetration of the crime. In assessing an offer of proof relating to such evidence, the court must decide whether the evidence could raise a reasonable doubt as to defendant's guilt and whether it is substantially more prejudicial than probative under Evidence Code section 352." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1325.)

Here, at the Evidence Code section 402 hearing, defense counsel argued that the following evidence tied another gang member to the Brooks/Wolfe shooting: witnesses at the scene saw a white Dodge Intrepid; a video camera at the scene filmed a white car drive by at the time of the shooting; a member of the Playboy gang, owned a white Dodge Intrepid; and the police photographed that car. The trial court excluded the evidence, reasoning: "It does seem confusing to me to bring in the name of this person or this car that really doesn't seem to play into the case. So my preliminary ruling is to preclude inquiry into that. If [defense counsel] can formulate a more coherent cogent theory of why it would be relevant, I would be glad to rehear it, but right now I'm not getting it."

We agree with the trial court. While evidence may have linked *a* white Dodge Intrepid to the shooting, there was no evidence that it was the Playboy gang member's white Dodge Intrepid that was involved. Since there was no evidence actually linking

the Playboy gang member to the shooting, the trial court properly excluded evidence that he was investigated in connection with the Brooks/Wolfe shooting.

4. *The Erroneous Admission of Evidence of the Victim's Sympathetic Character Was Harmless*

Defendant contends the trial court erred in admitting, over defendant's relevance objection, evidence of statements Nolte and Walther made at the conclusion of their interview of defendant.[4] While we agree that the evidence was not relevant, we find the error in admitting it to have been harmless.

Only relevant evidence is admissible. (Evid. Code, § 350.) Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) But a judgment may not be reversed by the erroneous admission of evidence unless the admission of the evidence resulted in a miscarriage of justice (Evid. Code, § 353), such that the reviewing court is convinced that "it is reasonably probable that appellant

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[4] The recording and transcript of defendant's postarrest interview included the following comments made by Nolte and Walthers at the conclusion of the interview: "How does this -- how do you feel now that we've told you that people were hurt and one individual was killed. This guy that was killed was a nice guy. He was not a gang member, okay. Not a gang member. He had a family, his mother lived in the area. He had family out of state. Everybody came in for the funeral. This is not a gangster. You understand that?" "This is not somebody who's out there living by the sword and all that stuff and into gang stuff and out spraying graffiti and claiming a hood. This is merely somebody who was walking down the street late at night, which anybody should be able to do, and gets killed by your gun. You understand that?" "And the person who was standing on those steps who got shot also, was not a gang member either. He was just a poor homeless guy. He didn't have no gun. Never -- if he had enough money for a gun, he could have got himself a hotel for the night, but he couldn't even do that. He had to sleep on those steps because that's the only place that poor guy has to even sleep." "He washed windows at that gas station before he was, you know -- you seriously messed up now. He was shot. He had eleven holes going, some of those are in and out, but he had a eleven different gunshot wound injuries." "He was in the hospital for a very, very long time in pain." "And in a convalescent [home] after because he was unable to walk and do all that stuff."

would have obtained a more favorable result had the evidence been excluded." (*People v. Avitia* (2005) 127 Cal.App.4th 185, 194.)

In *People v. Gurule* (2002) 28 Cal.4th 557, 624, our Supreme Court found evidence consisting of a brief description of the murder victim's religious background and the fact his mother hugged him the morning of his death "obviously carried the potential to inflame the passions of the jury against defendant." However, it found the error in admitting the evidence harmless because it had not been established that the result of the trial would have been different if the evidence had been excluded.

Here, the prosecutor argued that the detective's statements were relevant because they were part of an interview technique designed to make the suspect feel bad for his crimes and "prompt a truthful response about what happened. [¶] And the lack of, in the People's view, the lack of a truthful response when faced with those very sympathetic facts is evidence of his consciousness of guilt and evasiveness and lack of remorse." The trial court allowed the evidence "in terms of interrogation techniques" but admonished the jury "in examination a question is not evidence and is not to be considered by you as evidence. So anything that the detective says in his examination of Mr. Johnson in this interview that you have heard, you are not to consider that as evidence in any way. What you can consider for evidence is any response made by Mr. Johnson."

The detective's comments about the victims' character, their circumstances in life and their families "obviously carried the potential to inflame the passions of the jury against defendant." (*Garule*, *supra*, 28 Cal.4th at p. 624.) As they were more than incidental references, it was error to admit this evidence. However, in light of the strength of the evidence against defendant, including his admission that he was one of two shooters in the Brooks/Wolfe incident, that he was the shooter in the Romo incident and that he gave his gun to a companion knowing it was going to be used in the Jenkins shooting, we cannot see how the result of the trial would have been different had the challenged evidence been excluded. Accordingly, the error was harmless.

5. *The Abstract of Judgment*

Defendant contends that the abstract of judgment fails to reflect the trial court's oral judgment in that (a) it does not reflect the 685 days of presentence custody credit awarded by the trial court; and (b) it incorrectly states that defendant was sentenced to life with the possibility of parole on counts 1, 2, and 4, whereas the trial court actually sentenced defendant to 15 years to life. The People concede that the abstract should be corrected to reflect a term of 15 years to life on counts 1, 2 and 4, but argue that defendant is not entitled to 685 days of presentence custody credit because he was already in custody on the possession of a firearm charge. (*People v. Bruner* (1995) 9 Cal.4th 1178 (*Bruner*).)

Presentence custody credit "shall be given only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted." (Pen. Code, § 2900.5, subd. (b).) Section 2900.5 does not authorize credit where the pending proceeding has no effect whatever upon a defendant's liberty; in other words, where the defendant is incarcerated on some other charge while awaiting trial. (*Bruner*, *supra*, 9 Cal.4th at p. 1184.)

In *People v. Wrice* (1995) 38 Cal.App.4th 767, 773, the court held that it was within the court's inherent power to summarily dismiss an appellate claim of error in presentence custody calculations where resolution of the issue involves a factual dispute.

Here, it appears that during at least a portion of the period he was awaiting trial in this case, defendant was committed to the juvenile camp facility as a result of his admission to possession of a firearm. Under *Bruner*, defendant was not entitled to presentence custody credits in this case for time he was in custody in the juvenile matter. Nevertheless, the prosecutor did not object when the trial court awarded defendant 685 days of presentence custody. But the abstract of judgment reflects no presentence custody credits.

Because the resolution of the correct number of custody credits to be awarded involves a factual dispute as to the exact dates defendant was in custody on the juvenile matter, defendant must seek relief in the trial court for correction of the record before seeking the credits from this court. (*Wrice*, *supra*, 38 Cal.App.4th at p. 773.)

DISPOSITION

That part of the appeal seeking to modify the abstract of judgment to reflect custody credits is dismissed without prejudice to defendant's right to ask the trial court to reconsider the award of credits. The matter is remanded to the trial court with directions to correct the abstract to show that the court imposed a sentence of 15 years to life on counts 1, 2 and 4. The amended abstract of judgment shall be forwarded to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

RUBIN, ACTING P. J.

WE CONCUR:

BOLAND, J.

FLIER, J.